IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 16, 2003 Session

STATE OF TENNESSEE v. PAUL E. ORR, JR.

Appeal from the Circuit Court for Marshall County
No. 14474 Charles Lee, Judge

No. M2002-02332-CCA-R3-CD - Filed April 13, 2004

The Marshall County Circuit Court ruled that T.C.A. § 55-10-403(n), which effectively allows Davidson County to have first-time DUI offenders perform public service instead of serving a jail sentence, violates equal protection rights and that the doctrine of elision renders the general DUI sentencing statute, T.C.A. § 55-10-403, unconstitutional. The state appeals, claiming (1) that the defendant's constitutional challenge to the statute was not properly before the circuit court and (2) that T.C.A. § 55-10-403 and subsection (n) are constitutional. We hold that the defendant's constitutional challenge to T.C.A. § 55-10-403(n) was properly before the circuit court but fruitless. In addition, we hold that even if subsection (n) were unconstitutional, the general DUI sentencing statute would remain in effect. We reverse the trial court's order dismissing the defendant's conviction.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; Case Remanded

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

Paul G. Summers, Attorney General and Reporter; Kim R. Helper, Assistant Attorney General; William Michael McCown, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellant, State of Tennessee.

Walter W. Bussart, Lewisburg, Tennessee, for the appellee, Paul E. Orr, Jr.

OPINION

This case relates to the defendant, Paul E. Orr, Jr., being stopped and arrested for driving under the influence (DUI) on December 16, 2000. Little is known about the facts of this case because a transcript or audiotape of the General Sessions Court proceeding, if they exist, were not included in the appellate record. However, according to the affidavit of complaint filed by the arresting officer, the officer found the defendant's red van parked in the middle of Liberty Road on

December 16. The defendant was sitting in the driver's seat, had a beer between his legs, and was passed out. The officer roused the defendant, who was incoherent, uncooperative, unsteady on his feet, and had the smell of alcohol on his person.

The record of the defendant's conviction consists of an arrest warrant form from the Marshall County General Sessions Court. According to the warrant, the defendant was convicted of DUI and was sentenced to eleven months, twenty-nine days to be served as forty-eight hours in the county workhouse and the remainder suspended upon his paying a three hundred fifty dollar fine, paying court costs, and attending DUI school. In addition, the general sessions court ordered that the defendant's driver's license be suspended for one year. The record reflects that on the same day as his conviction and sentence, the defendant filed a motion to dismiss the DUI charge on the basis that T.C.A. § 55-10-403(n) is unconstitutional because it applies only to Davidson County and, therefore, does not allow a Marshall County court to allow a defendant convicted of DUI, first offense, to serve his sentence by performing public service instead of confinement. After the general sessions court convicted and sentenced the defendant, the defendant's attorney filed a handwritten notice of appeal, which states as follows:

> Comes now the defendant, Paul E. Orr, Jr., through counsel and pursuant to Rule 37(b)(2) of the TR Cr. P and TCA 40-4-112 and 40-35-401 and gives Notice of his Appeal to the Circuit Court of Marshall County, Tennessee from the judgment of the General Sessions Court on the 6th day of February, 2001.

The defendant also filed a motion in the Marshall County Circuit Court to dismiss his DUI conviction, again arguing that T.C.A. § 55-10-403(n) is unconstitutional. After a hearing, the trial court agreed and held that the statute violated equal protection rights afforded by the United States and Tennessee Constitutions. In addition, the trial court determined that the unconstitutionality rendered the entire general DUI sentencing statute, T.C.A. § 55-10-403, unconstitutional.

I. JURISDICTION OVER ISSUE RAISED IN MOTION TO DISMISS

The state argues for the first time on appeal that the constitutional challenge raised in the defendant's motion to dismiss was not properly before the circuit court because the defendant's notice of appeal shows that he only was appealing his sentence and the motion to dismiss "exceed the scope of the appeal set forth in the notice." The defendant claims in his appellate brief that the issue was properly before the circuit court and that the "warrant and record clearly indicate that Paul Orr was found guilty following a bench trial in the General Sessions Court." We view the record to reflect a guilty plea, but we conclude that the circuit court had jurisdiction to consider the issue.

Rule 5(c)(1), Tenn. R. Crim. P., provides that for misdemeanors other than small offenses, an appeal "shall lie from a judgment upon a plea of guilty to a misdemeanor after waiver of grand jury investigation and jury trial, but only as to the sentence imposed." See also State v. Winebarger, 70 S.W.3d 99, 100 (Tenn. Crim. App. 2001); Op. Tenn. Att'y Gen. No. 01-079 (Sept. 14, 2001).

Moreover, the rule "mandates that the appeal of the sentence is de novo, and this necessarily requires a new sentencing hearing in the criminal court pursuant to Chapter 35 of Title 40, Tennessee Code Annotated." Winebarger, 70 S.W.3d at 100.

On the warrant form in this case, under the heading "**JUDGMENT**," a box is checked beside the following statement: "Fined $_____ and costs and sentenced to serve _____ in the county work house, on plea of _____ guilty and waiver or rights of trial by jury and indictment by Grand Jury." On the first line, the general sessions court has written "350.00." On the second line, the court has written "11 mo 29 days." The third line remains blank. Thus, the warrant on its face shows that the defendant pled guilty to DUI. Moreover, a footnote in the trial court's order granting the defendant's motion to dismiss states, "From the judgment it appears that the defendant entered a plea of guilty and only appeals the sentence in this court."

Although the record before us shows that the defendant pled guilty, we believe the trial court could consider the defendant's claim that T.C.A. § 40-35-403(n) is unconstitutional. The trial court stated in a footnote in its order that the defendant appeared to plead guilty in general sessions court and that he "only appeals the sentence in this court." The trial court, in its de novo review, could treat the defendant's claim regarding the constitutionality of the DUI sentencing statute as an appeal of the defendant's sentence.

II. T.C.A. § 55-10-403(n) AND ELISION

Next, the state contends that T.C.A. § 55-10-403(n) is constitutional because a rational basis exists for allowing trial courts in counties with populations over 100,000, i.e., Davidson County, to allow first-time DUI offenders to perform public service instead of serving a mandatory forty-eight hours in jail. In addition, the state argues that even if subsection (n) is unconstitutional, that does not result in the general DUI sentencing statute being unconstitutional. The defendant contends that the circuit court properly determined that subsection (n) is unconstitutional because no rational basis exists for differential treatment of first-time DUI offenders in Davidson County. He also contends that because T.C.A. § 55-10-403(n) is unconstitutional, the doctrine of elision renders the entire general DUI sentencing statute unconstitutional. We hold that the circuit court erred by ruling on the constitutionality of subsection (n). Moreover, we hold that even if subsection (n) is unconstitutional, the general DUI sentencing statute remains in effect.

T.C.A. § 55-10-403 provides, in pertinent part, as follows:

> (a)(1) Any person or persons violating the provisions of §§ 55-10-401--55-10-404 shall, upon conviction thereof, for the first offense be fined not less than three hundred fifty dollars ($350) nor more than one thousand five hundred dollars ($1,500), and such person or persons shall be confined in the county jail or workhouse for not less than forty-eight (48) hours nor more than eleven (11) months and twenty-nine (29) days; and the court shall prohibit such

> convicted person from driving a vehicle in the state of Tennessee for a period of time of one (1) year. . . .
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> . . . .
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> (n) Notwithstanding the provisions of this section to the contrary, in counties with a metropolitan form of government and a population in excess of one hundred thousand (100,000) according to the 1990 federal census or any subsequent federal census, the judge exercising criminal jurisdiction may sentence a person convicted of violating the provisions of § 55-10-401, for the first time to perform two hundred (200) hours of public service work in a supervised public service program in lieu of the minimum period of confinement required by the provisions of subsection (a).
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> . . . .

In State v. Tester, 879 S.W.2d 823 (Tenn. 1994), our supreme court held that T.C.A. § 41-2-128(c)(9), which allowed second-time DUI offenders in three Tennessee counties to serve their minimum mandatory jail sentences in a work release program, violated equal protection under the state and federal constitutions. The court then considered the doctrine of elision, which allows a court under certain circumstances to strike out unconstitutional portions of a statute and find the remaining provisions to be constitutional and effective. The court stated,

> "The doctrine of elision is not favored. The rule of elision applies if it is made to appear from the face of the statute that the legislature would have enacted it with the objectionable features omitted, and those portions of the statute which are not objectionable will be held valid and enforceable . . . provided, of course, there is left enough of the act for a complete law capable of enforcement and fairly answering the object of its passage. However, a conclusion by the court that the legislature would have enacted the act in question with the objectionable features omitted ought not to be reached unless such conclusion is made fairly clear of doubt from the face of the statute. Otherwise, its decree may be judicial legislation. The inclusion of a severability clause in the statute has been held by this Court to evidence an intent on the part of the legislature to have the valid parts of the statute enforced if some other portion of the statute has been declared unconstitutional."

Id. (quoting Gibson County Special School Dist. v. Palmer, 691 S.W.2d 544, 551 (Tenn. 1985)). The court held that "because we cannot conclude clear of doubt from the face of the statute that the Legislature would have enacted the statute with the unconstitutional provisions omitted, the doctrine

of elision does not apply" and that the entire work release statute, T.C.A. § 41-2-128(c), was unconstitutional. Id. at 831.

In State v. Ladonna Kay Lambert, No. 03C01-9812-CR-00431, Sullivan County (Tenn. Crim. App. Mar. 20, 2000), the defendant raised an issue identical to the defendant's claim in the present case, arguing that T.C.A. § 55-10-403(n) unconstitutionally violated her rights to equal protection because the statute did not apply in all counties. This court, applying the doctrine of elision discussed in Tester, held that assuming arguendo T.C.A. § 55-10-403(n) was unconstitutional, the doctrine of elision did not apply. However, this court determined that the fact that the doctrine of elision did not apply meant only that all of subsection (n) was unconstitutional and that "we are left with the general D.U.I. law which requires service of minimum mandatory sentences before a defendant is eligible for community service work." Id., slip op. at 6. This court held that it did not need to address the constitutionality of T.C.A. § 55-10-403(n) because the defendant would have to serve her mandatory minimum sentence in incarceration regardless of the outcome of any constitutional inquiry. That is, if subsection (n) were constitutional, it would not apply to the defendant's Sullivan County sentence, and if it were unconstitutional, the defendant would still be sentenced under § 55-10-403(a), which requires that a defendant serve a minimum amount of time in confinement. Either way, the defendant would have to serve forty-eight hours in jail.

We conclude that the trial court should not have ruled on the defendant's constitutional challenge to T.C.A. § 55-10-403(n). A court should not address the constitutionality of a statute unless necessary for the determination of the case and of the rights of the parties. See County of Shelby v. McWherter, 936 S.W.2d 923, 931 (Tenn. Ct. App. 1996). Tennessee Code Annotated section 55-10-403 was enacted in 1953 and amended in 1992 to include subsection (n). Obviously, the legislature did not intend for any ruling that subsection (n) is unconstitutional to render the entire DUI sentencing law unconstitutional. As this court stated in Ladonna Kay Lambert, assuming arguendo that subsection (n) were unconstitutional, subsection (n) must be elided from T.C.A. § 55-10-403, and we are left with the general DUI sentencing law. Thus, the outcome of the Marshall County Circuit Court's constitutional inquiry would not have changed the fact that the defendant still would have to serve forty-eight hours in confinement. The trial court erred by ruling on the defendant's claim that T.C.A. § 55-10-403(n) is unconstitutional and by holding that the doctrine of elision rendered T.C.A. § 55-10-403 unconstitutional.

Based upon the foregoing and the record as a whole, we reverse the trial court's order granting the defendant's motion to dismiss the defendant's conviction and remand the case for disposition.

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JOSEPH M. TIPTON, JUDGE